





# ARIZONA'S OPEN MEETING LAW




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# What is the Open Meeting Law?

- A.R.S. § 38-431.01(A), § 38-431.09
  - Protect and inform the public
  - Maintain integrity of government
  - Build trust between government and citizens
- 




# What is the basic requirement of the Open Meeting Law?

- Conduct deliberations and proceedings in the open
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# Who does it apply to?

- **Public bodies** .
  - All quasi judicial-bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.
  - This group is an “advisory committee.”
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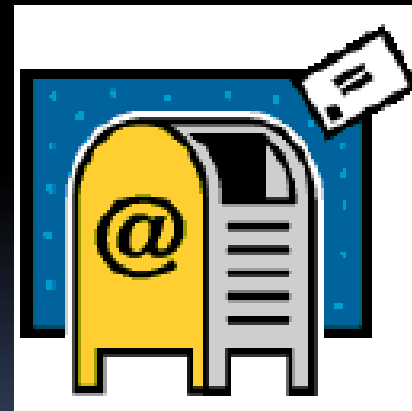
# Advisory Committees & Subcommittees

- Must comply with all requirements of the Open Meeting Law
- Must take minutes or make recordings of their meetings



# What's a "meeting?"

- Gathering, in person
- or through technological devices
  - phone
  - email
  - fax




# What's a quorum?

- Generally in Arizona, a quorum is a majority of a board or commission.
- Look to your statutes and rules. (R7-2-201(J): A quorum of an advisory committee shall be a majority of the voting members of the advisory committee."
- Vacancies DO count toward the number of members of a board unless your statutes/laws say otherwise.




# What if you don't have quorum?

- You don't have a "meeting"
  - You can't take action or continue discussions
  - If so many members of the public body leave such that there is no longer a quorum, you CANNOT continue to meet.
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# Discuss, Propose or Take Legal Action

- Normal use and meaning of these words will apply.
  - Proposing legal action = “put forward for consideration, discussion, or adoption.”
  - Includes deliberations = discussion of facts and opinions re: potential board business.
  - RULE: If this occurs among a quorum of the Board IT IS A MEETING.
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# Telephone Conferencing



- Allowed if the public body has approved this practice.
- The notice and agenda should indicate telephone participation.
- The public must be able to hear.
- Minutes should identify telephonic participants and describe public access.



# Meeting Locations

- Meetings must be accessible
  - Discourage procedures that obstruct or inhibit public attendance such as:
    - Remote or inadequate location
    - Required sign-in sheets
    - Unreasonable time
- 

# Public Access to Meeting

- Can you move the meeting to another location close to the original location?
- ☒ YES ☐ NO
- leave a staff person to give directions
  - post a large notice
  - start the meeting a little later

# Notice of Meetings

- A.R.S. § 38-431.02(A)(1); § 7.6.3.1

Public bodies of the State shall:

- conspicuously post a statement on their website stating where all public notices of their meetings will be posted
  - include physical and electronic locations
  - give additional public notice as is reasonable and practicable
- Post all public meeting notices on their website and give additional public notice as is reasonable and practicable as to all meetings.
- A technological problem or failure that prevents posting or use of the website does NOT preclude the holding of the meeting if the public body complies with all other notice requirements.

# Notice of Meetings




## Physical Posting Location

- Post in a location where the public has reasonable access (unlocked building; geographically accessible)
- Post during normal business hours
- Make sure notice can't be "borrowed"
- Make sure front **and** back can be read if inside a locked display case



# Notice of Meetings

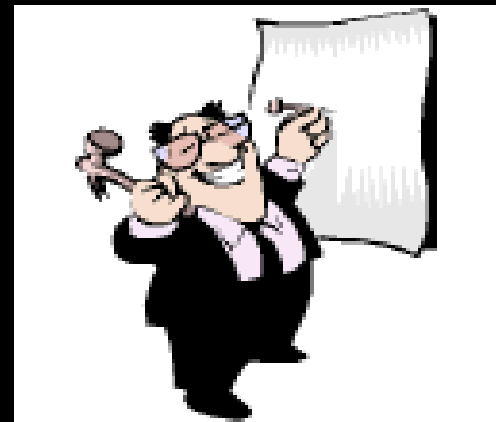
- Notice required at least 24 hours in advance of a meeting
  - to all members of the public body
  - to the public
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# Exceptions to 24 Hour Requirement

- Three exceptions to 24 hour notice:
  - Actual Emergency
  - Ratification of action taken in violation of open meeting law – REQUIRES **72** hour notice
  - Continuation of a previously noticed meeting that was recessed



# Contents of Notice




- The public body
- Date, time, place (address, room number)
- Agenda or how to obtain agenda
- Executive Session if applicable (cite specific statutory authority)
- Accommodations under the ADA




# Notice of Regular Meetings

## Practical Pointers:

- Consistent meeting times
    - Avoid moving targets
    - 6:00 a.m. one time and 8:30 p.m. another
  - Avoid cancellations and rescheduling
  - Be careful about scheduling special meetings
    - only if necessary, and give plenty of notice
- 



# Proof of Posting

- Document the date, time and place of posting
  - Keep a record of notices and certifications of posting
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# Social Events




- If more than a quorum may be present
  1. Post a “courtesy notice” announcing social event where a quorum may be present
  2. Include statement that no business of the public body will be discussed and no action will be taken
  3. Board members should avoid talking with each other - or have a witness!

# Recessed & Resumed Meeting

- A.R.S. § 38-431.02(E); § 7.6.5
- Can **recess and resume** a meeting with less than 24 hours notice if proper public notice of initial session of the meeting is given and, prior to recessing, notice is publicly given regarding the time and place of the resumed meeting or regarding the method by which notice shall be publicly given.

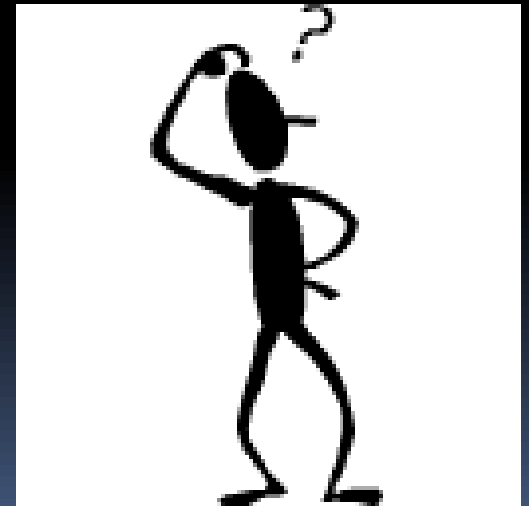


# Agendas

- Agendas must include matters to be
    - discussed,
    - considered or
    - decided
    - at the meeting
  - Must contain information reasonably necessary to inform the public
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# Understandable

- No acronyms
- statutory cite is not enough without explanation
- no legalese
- no agency slang





# Agenda Items

- Describe “specific” items to be discussed, considered or decided
  - **NOT** GOOD ENOUGH without details:
    - “new business”
    - “old business”
    - “personnel”
    - “announcements”
- 




# If it's NOT on the Agenda

- **CANNOT** discuss it
- all discussion must be **reasonably related to** an adequately-described agenda item
- Add new items to the agenda for future meeting



# Backup Materials

- Members' packets
  - State on the agenda where they will be available for public inspection
  - Must be available 24 hours before the meeting
  - Can charge reasonable public record fee for copies
- 



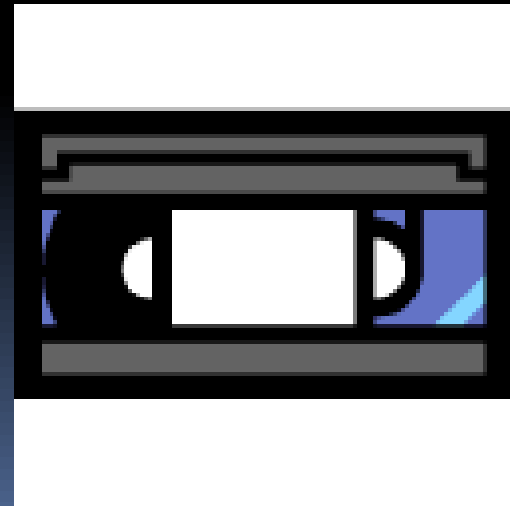
# Changes in Agenda

- post and distribute same as original
- 24 hour rule still applies
  - ▣ EXCEPTION: in case of actual emergency

# Minutes




- Must have them
- in writing or
- Recorded: audio or video tape






# Contents of Minutes

- date, time, place
  - members present/absent
  - general description of matters discussed or considered
  - accurate description of legal actions proposed, discussed or taken
  - name of members who propose each motion
  - name of each person making statements or presenting material and a reference to the legal action addressed
- 



# Contents of Executive Session Minutes

- date, time, place
  - members present/absent
  - general description of matters discussed or considered
  - accurate description of instructions given to attorneys regarding contracts, litigation or settlement options
  - accurate description of instructions given to designated representatives regarding
    - negotiations with employees for salary/benefits
    - negotiations for purchase, sale or lease of real property
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# Public Access to Minutes

- Minutes or a recording shall be available for public inspection 3 working days after the meeting
- make tape available
- can stamp as “Draft”



# Public Access to Executive Session Minutes

- Executive session minutes or recordings shall be kept confidential





# Who may have access to executive session minutes?

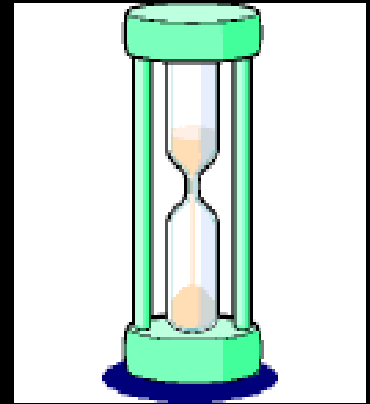
- members of the public body, including members who did not attend meeting
- officer, appointee or employee who was the subject of the meeting authorized by A.R.S. § 38-431.03(A)(1)
- attorney for the public body
- auditor general
- attorney general or county attorney investigating Open Meeting Law violations
- the court

# Separate Tapes and Minutes

- Use separate tapes and written minutes for the public sessions and the executive sessions
- Makes prompt disclosure possible without redaction



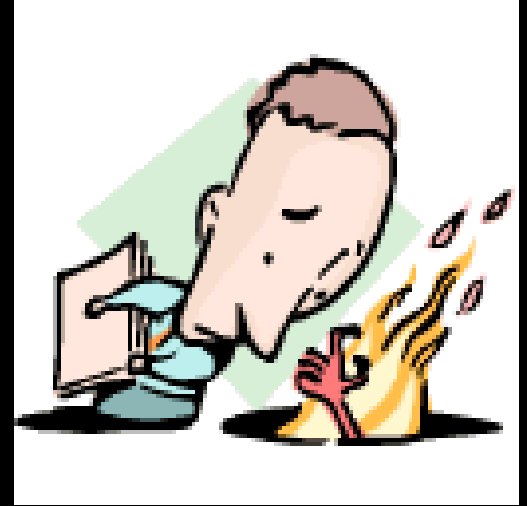
# Public's Rights



- Must be permitted to attend meeting
- Cannot require them to sign in
- Not permitted to speak, unless public body allows it
- If they make presentation, must identify themselves (required for Minutes)
- Cannot disrupt proceedings (but make a good record before removing someone)
- Can limit speaking time of each speaker

# Calls to the Public

- A.R.S. § 38-431.01(H); § 7.7.7
- Optional
- Avoid pitfall of getting into discussion of matters not on the agenda
- Public body's response is limited:
  - direct staff to study the matter
  - respond to criticism
  - schedule matter for future meeting
- Subject to reasonable time, place and manner restrictions



# Public's Recording of Proceedings

- Public may record on tape, camera or video (ARS § 38-431.01(F))
- May restrict only if it truly interferes with conduct of the meeting



# Executive Sessions

- Just because you CAN have one, should you?
- Public suspicion vs. actual need




# Executive Sessions



- “gathering...from which the public is excluded...” (A.R.S § 38-431(2))
- Must include in the notice that you may go into executive session if you plan to do so (cite specific statutory provision)
- Executive Session is allowed for specific types of items
- Must be item on the agenda




# Executive Session Topics

- A.R.S. § 38-431.03(A)(1)-(7)
  - Personnel matters
  - Confidential records
  - Legal advice
  - Litigation, contracts and settlement discussions involving attorney consultation
  - Employee salary discussions
  - International, interstate and tribal negotiations
  - Purchase, sale or lease of real property
- 






# Executive Sessions

- Must first vote (in public session) to go into executive session
  - Chair asks members of the public to leave the room; or members adjourn to another room
  - Chair is required to remind members that the matters discussed and minutes of the executive session are confidential
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# Executive Sessions


- Only certain subjects are allowed
  - Restrict discussion to purpose for which adjourned
  - No ACTION permitted
  - Must return to public session for a vote
  - Must have Minutes
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# Who may attend Executive Session?

- A.R.S. § 38-431(2)
- Members of the public body
- officers, appointees and employees but only as allowed in A.R.S. § 38-431.03
- auditor general in performance of official duties (A.R.S. § 41-1279.04)
- “only individuals whose presence is reasonably necessary in order for the public body to carry out its executive responsibilities”

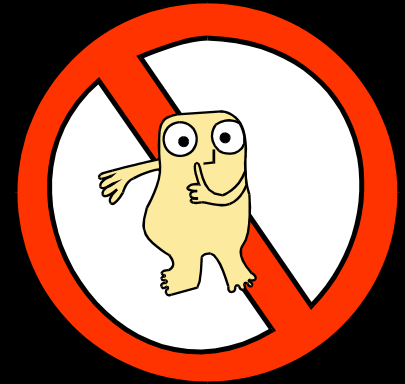


# Taking Legal Action

- CANNOT do this in executive session
  - Must return to public session to vote
  - NO STRAW POLLS IN EXECUTIVE SESSION
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# Executive Session Pitfalls

- Failure to keep executive session discussion confidential
- Failure to advise persons about the confidentiality requirement A.R.S. § 38-431.03(C)
- Individuals present who are not “reasonably necessary”
- Practical pointer: Put a reminder right on the agenda for the chair to recite **Every Meeting**



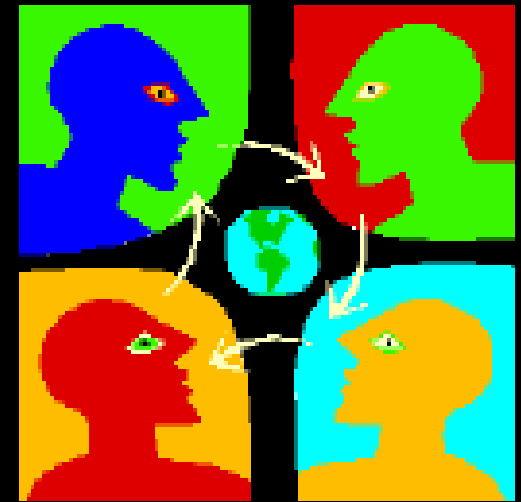


# Avoiding OML Violations

- DO NOT discuss, propose, deliberate or take legal action on any potential board business between a quorum of the board outside a properly noticed public meeting.
  - “Board business” – read broadly! Includes anything that may foreseeably come before the board for action.
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# Circumvention


- Serial Communications
- cannot have meetings with less than a majority or use any device to circumvent the law
  - meeting with individual members
  - reporting what other members said
  - polling the members






# Meeting “Etiquette”

Discourage the following:


- Whispering to other Board members
  - Passing notes between Board members
  - Letting members of the public talk to each member before the meeting starts with their hands over the microphone
  - If it's about business of the public body, this could become a violation
  - In any event, it looks like a violation
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# Conclusion No. 1

(from AG Opinion on E-mail: No. I05-004 (R05-010))

- E-mail communications among a quorum of a public body are subject to the same restrictions that apply to all other forms of communication among a quorum.
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## Conclusion No. 2

- E-mails among a quorum that involve discussions, deliberations or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means.
  - Does not have to be simultaneous
- 





## Conclusion No. 3

- One-way e-mail communication by one member to a quorum of members that proposes legal action is a violation even if there is no discussion, deliberation or legal action taken.
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# Proposing an Agenda Item?

- Proposing an item for the agenda via e-mail is allowed if you do not propose legal action.
  - Communicate the TOPIC only NOT the legal action you want the board to take.
  - Do not discuss, deliberate or take legal action regarding the proposed agenda item.
- 




# “Propose” – EXAMPLES in the Opinion

- “Councilperson Smith was admitted to the hospital last night”
    - Does NOT propose legal action
  - “We should install a crosswalk at First and Main”
    - Does propose legal action
    - It’s more than a topic for the agenda because it urges or suggests an outcome
- 




# One-Way E-mail from Staff

- Passive receipt of information from staff, without more, does not violate OML
  - Staff may send e-mail to board members
  - Staff may send agenda packets to board members
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# Suggestions for E-Mail

- If staff send e-mails to board members, you may want to include a notice that advises members not to forward the e-mail to other board members or copy other board members in their reply to staff.
- 




# Improper Staff Communication

- Staff may NOT send opinion or substantive communication about board business from a board member to enough other members to constitute a quorum
  - Cannot use a 3<sup>rd</sup> person to violate the OML
  - A third person can now be charged with a violation and pay penalties
- 






# E-Mails are Public Records

- E-mail communications of board members related to their official duties are public records that must be maintained for public inspection and reproduction.
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## In Summary . . .

- E-mail is a useful technological tool,
  - **BUT** it must be used in a manner that follows the OML's mandate that all public bodies propose legal action, discuss, deliberate and make decisions in public.
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# Violations & Sanctions

- Actions are null and void
  - Investigation by Attorney General or County Attorney
    - may issue “investigative demands”
    - conduct examinations under oath
    - require written statements under oath
    - may file enforcement action in Superior Court
- 



# Civil Penalties


- A.R.S. § 38-431.07; § 7.13.3
  - up to \$500
  - For each violation
  - Against anyone who commits a violation
  - Against anyone who knowingly aids, agrees to aid or attempts to aid another in committing a violation
  - Individual, not public body, pays penalty
- 

# Attorney's Fees

- A.R.S. § 38-431.07; § 7.13.4
- Violators could be ordered to pay successful plaintiff
- If court finds “intent to deprive the public of information or opportunity to be heard” - could require the board member to pay out of his or her own pocket



# Removal from Office

- A.R.S. § 38-431.07; § 7.13.6
  - If intent to deprive the public of information or opportunity to be heard
  - Court may remove the public officer from office
- 



# Resources

- Attorney General's Office (request assistance through the Department)
  - Arizona Agency Handbook:  
<https://www.azag.gov/agency-handbook>
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